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No. 95-1769

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IN THE  
**Supreme Court of the United States**

October Term, 1995

ROBERT C. McFARLANE,

*Petitioner,*

v.

ESQUIRE MAGAZINE, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The District Of Columbia Circuit**

**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the Court should review the dismissal of a libel action brought by a public figure who has failed to present any evidence of actual malice, much less the clear and convincing evidence of actual malice required by this Court.

## PARTIES TO THE PROCEEDINGS

Petitioner Robert C. McFarlane was plaintiff in the District Court and appellant in the United States Court of Appeals for the District of Columbia Circuit.

Respondent Esquire, defendant and appellee below, is a magazine published by the magazine division of The Hearst Corporation, and has its principal place of business in New York, New York.

Respondent The Hearst Corporation, defendant and appellee below, is a corporation organized under the laws of Delaware, with its principal place of business in New York, New York. The Hearst Corporation owns and publishes Esquire.

Respondent Craig Unger, defendant and appellee below, was, at all times relevant to this action, a freelance journalist who wrote the article at issue in this case. At the times relevant to this action, Unger resided in New York, New York. He has never been an employee of Esquire or Hearst. He currently resides in Massachusetts.

## RULE 29.6 LISTING

Respondent The Hearst Corporation has no parent companies or publicly-held, nonwholly owned subsidiaries.

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**BRIEF IN OPPOSITION**

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The unanimous decision below reflects the straightforward application of three decades of carefully crafted constitutional law and settled jurisdictional principles. This accumulated wisdom prohibits recovery of damages for defamation based upon the publication of a veteran journalist's thoroughly researched account of allegations about a public figure made by a knowledgeable source, where the author uncovered no evidence to disprove the allegations and the article dealt candidly with the credibility of the source. This case presents no conflict in the circuits or departure from judicial precedent, or any other compelling reason to grant the Petition under Supreme Court Rule 10. The Petition should be denied.

**STATEMENT OF THE CASE**

**A. Background**

This libel lawsuit arises from a ten-page article (the "Article") prepared by an experienced magazine writer who investigated charges that surfaced throughout 1991 about the so-called "October Surprise" controversy — claims that the

1980 Reagan presidential campaign conspired to delay the release of hostages in Iran for political gain. The Article, published in the October 1991 issue of *Esquire* magazine, capsulized the work of a journalist who laboriously researched leads, reviewed mountains of books and articles, and conducted some 150 interviews in an attempt to analyze the then-known facts about the controversy. The Article included allegations from a former Israeli intelligence officer that Petitioner Robert McFarlane had a "special relationship" with Israeli intelligence, assisted the Israelis in tasking convicted spy Jonathan Pollard, and participated in key October Surprise events. Through this lawsuit, McFarlane, the former National Security Advisor who was convicted — and later pardoned — for misleading Congress about his role in the Iran-Contra scandal, seeks to recover damages for defamation based on the publication of these allegations.<sup>1</sup>

### B. The Author's Investigation

The allegations of an October Surprise first captured the public's attention in April 1991, when *The New York Times* published an op-ed column by former National Security Council staff member Gary Sick suggesting that campaign operatives working for Republican presidential candidate Ronald Reagan had conspired to delay the release of American hostages. See Gary Sick, *The Election Story of the Decade*, N.Y. Times, Apr. 15, 1991. JA 721-22<sup>2</sup>. This astonishing report spawned a massive hunt by congressional investigators and

1. In a separate libel action, McFarlane has sued Ari Ben-Menashe and the publisher of Ben-Menashe's 1994 book, *Profits of War*, based on the publication of similar but more extensive allegations about McFarlane. McFarlane's lawsuit against Ben-Menashe, which was summarily dismissed by the District Court, is pending in the United States Court of Appeals for the District of Columbia Circuit. See *McFarlane v. Ben-Menashe, et al.*, No. 95-7201 (D.C. Cir.).

2. "JA" refers to the Joint Appendix submitted by the parties to the United States Court of Appeals for the District of Columbia Circuit. "DSA" refers to the Defendants/Appellees' (now Respondents) Supplemental Appendix submitted to the Court of Appeals. The District Court's opinion is referred to herein as "D. Ct. Op.," followed by a cite to the Appendix accompanying the Petition.

scores of journalists who, like the American public, were still struggling to comprehend the disclosures made during the Iran-Contra affair.

Along with numerous colleagues and congressional investigators, veteran journalist Craig Unger set out to examine the trail of the October Surprise.<sup>3</sup> His impressive roster of more than 100 sources included a number of high-ranking current and former government officials, including former Attorney General Elliot Richardson, former National Security Council staffer Sick, Admiral Bobby Ray Inman, and now Secretary of State Warren Christopher; congressional investigators, including then House Foreign Affairs Committee Chief Counsel Spencer Oliver; former Israeli government officials, including Brigadier General Avraham Bar'Am; and numerous journalists knowledgeable in Middle Eastern affairs and intelligence matters. JA 692-705.

One of Unger's many sources was former Israeli intelligence officer Ari Ben-Menashe. Unger recognized Ben-Menashe as an undeniably controversial figure, but also a rare find: a former spy who was familiar with sensitive state secrets and was willing to talk about them. Unger and *Esquire* understood that, during the previous decade, Ben-Menashe had been a primary source for the Iran-Contra scandal and other important pieces of the U.S.-Israeli intelligence mosaic. JA 700-03; DSA 1135-36. Unger and *Esquire* also knew that former government officials and reputable journalists — including Sick, Robert Parry, who reported for PBS's Frontline television program, and Seymour Hersh, the Pulitzer Prize-winning reporter — had used or were using Ben-Menashe as a source. JA 695-96; DSA 1135-36, 1273-74.

While Unger's three-month investigation was under way, Congress and the FBI also pursued Ben-Menashe's claims. JA 690-91. Spencer Oliver, then-Chief Counsel to the House Foreign Affairs Committee, interviewed Ben-Menashe several

3. Unger graduated from Harvard College with honors in 1971. He has written for publications including *The New Yorker*, *The New Republic*, *New York Magazine*, *Vanity Fair*, *The Washington Post*, and *The Los Angeles Times*. He currently serves as the Editor-in-Chief of *Boston* magazine.

times in Oliver's official capacity as a congressional investigator. JA 685, 690. The purpose of these interviews was to determine whether a congressional investigation should be launched into the possibility of an October Surprise. During these interviews, Ben-Menashe told Oliver that he was a former Israeli intelligence official who had been given access to Israeli intelligence and other secret information. He also repeated essentially the same allegations about McFarlane that he had told Unger, including the assertion that McFarlane was a paid agent of Israeli intelligence. JA 685-86.

Contacted by Unger, Oliver confirmed that — although he viewed Ben-Menashe with some skepticism — he “took seriously” Ben-Menashe's allegations and information, including the information about McFarlane. JA 685-86. He had “spotcheck[ed]” some of Ben-Menashe's allegations and concluded that “at least some of his information was knowledgeable.” Oliver also informed Unger that “other staff members of [other] congressional committees” were in the process of exploring the same allegations, and confirmed that Ben-Menashe had linked McFarlane to Israeli intelligence. JA 686-87. Oliver told Unger that he had recommended that Congress investigate the charges more fully. JA 686-87, 703-04, 911.<sup>4</sup>

Oliver's disclosures prompted more legwork. Unger spoke with former Attorney General Richardson, who was part of the legal team for a company (Inslaw) that had submitted an affidavit to a federal court from Ben-Menashe. In the affidavit, Ben-Menashe claimed the McFarlane had a “special relationship” with a leading Israeli intelligence figure, Rafi Eitan, and had improperly provided Eitan with computer software for Israeli intelligence. JA 680-84, 700-01. Richardson told Unger that he took Ben-Menashe seriously and believed that Ben-Menashe “is who he says he is.” JA 681, 701.<sup>5</sup>

Unger also found previously published accounts about McFarlane's meeting in 1980 in Tehran with Reagan supporter

4. These facts were confirmed by Oliver in an affidavit submitted to the District Court in this action. See JA 685-87.

5. These facts were confirmed by former Attorney General Richardson in an affidavit submitted to the District Court in this action. See JA 680-84.

Earl Brian to discuss the release of Western hostages, and the charges that McFarlane had been recruited into Israeli intelligence and was “Mr. X” in the Pollard case. JA 692-706, 913-14, 915, 917. When Ben-Menashe claimed that he was being interviewed by FBI agents about McFarlane's ties to Israel, Unger checked it out. Using the agent's home telephone number provided by Ben-Menashe, Unger contacted FBI agent Emmitt Cartinhour to explore Ben-Menashe's claim. Cartinhour told Unger that the FBI could not confirm or deny “active” investigations, leading Unger to believe that the FBI was investigating Ben-Menashe's charges. JA 334-35, 704-05.

McFarlane's role in some October Surprise-related events was undeniable, as Unger discovered. For instance, Unger was able to confirm, through several press reports, McFarlane's involvement in a September 1980 meeting at the L'Enfant Plaza Hotel in Washington where McFarlane and Reagan campaign officials met a foreigner to discuss possible contact with Iranian officials about the release of American hostages. JA 693-95; see *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1305 (D.C. Cir. 1996). Based on everything Unger knew or believed at that time, it was entirely plausible to Unger that a man like McFarlane — who had been a central figure in the Iran-Contra affair, had cultivated undeniably close ties to Israel, and was well-schooled in the clandestine world of international espionage — might have had the “special relationship” with Israeli intelligence described by Ben-Menashe. JA 696, 699, 705-06, 921-22.

Unger's pursuit of the truth did not end there. As he prepared his article for *Esquire*, Unger tried to interview McFarlane, placing no less than five telephone calls to McFarlane's home and office over a two-month span. On June 11 and 12, 1991, he placed three calls to McFarlane and left messages each time, twice at McFarlane's home and once at his office. JA 169-70, 697-98, 953-55. On June 12, 1991, he faxed a letter to McFarlane requesting an interview about the October Surprise. That same day, McFarlane wrote back to deny the request for an interview, saying he “would be of little help.” JA 176-79, 697, 956-57.

On August 8, 1991, Unger again phoned McFarlane at his home and office. He left a message with McFarlane's secretary that he wanted to talk to McFarlane "about the allegations made about him in the Inslaw case," which linked McFarlane to Israeli intelligence.<sup>6</sup> Despite being familiar with the Inslaw allegations, McFarlane never responded to this message or to any of Unger's calls. JA 697-98, 921-22, 950-52, 958-61. As the District Court properly concluded, "McFarlane did decline to be interviewed." D. Ct. Op. at 55a.

### C. Esquire's Role

Esquire's role in the preparation of the Article began in the Spring of 1991, when Unger approached David Hirshey, then-Articles Editor of Esquire, about writing a profile of the newly appointed Ambassador to South Korea, Donald Gregg. DSA 1184-85; JA 171-72. Hirshey knew Unger to be a veteran, well-educated journalist who had written for numerous national publications and whose two previous articles for Esquire had been "exemplary." DSA 1189. *See also* DSA 1322, 1344-45; *McFarlane*, 74 F.3d at 1305. On May 21, 1991, Esquire and Unger executed a standard contract for the planned article. The contract granted Esquire the right to publish the piece, but Unger retained ownership and all intellectual property rights. JA 277.

In the course of researching his planned profile of Gregg, Unger became convinced that a comprehensive inquiry into the October Surprise held more promise as a magazine article. DSA 1081-83, 1185; JA 172. As Hirshey and Literary Editor Will Blythe recall, Unger requested that his article focus on the October Surprise, and they agreed. DSA 1089-90, 1185. Later that summer, Unger delivered a working draft of the Article to Esquire. DSA 1073-74. Although no one can recall which of the many drafts was first reviewed by Esquire edi-

6. Unger believed that McFarlane would understand the reference to Inslaw as implicating McFarlane's relationship with Israeli intelligence. JA 698-99. Unger testified that he did not leave a more explicit message about McFarlane's ties to Israeli intelligence because he did not know who would be conveying the message and he did not want to "embarrass" Mr. McFarlane. JA 167-68, 187.

tors, it is clear that five of the six sentences at issue in this lawsuit — the exception being "Both McFarlane and Brian declined comment" — were authored by Unger and present in the original draft delivered to Esquire. *See* DSA 1091-92, 1183. *Compare* JA 284 with JA 634, 639, 655, 662. The wording of these five sentences stayed the same throughout the editing process. In an early draft, the sentences were located closer to the end of the Article, but were moved forward when the narrative was organized chronologically. *See* DSA 1097. No substantive question was ever raised by any Esquire editor about these five statements. *See* DSA 1102-03, 1189-90, 1350-60.

By the time the Article appeared in the magazine, Hirshey, Blythe and Research Editor Mark Warren had made traditional editing decisions, including sharpening the prose and spotchecking some passages. *See, e.g.*, DSA 1182, 1199-1200, 1377-80. Esquire's editors were familiar with the "extraordinarily extensive" efforts that Unger had undertaken, had confidence in his work, and thus had no reason to independently attempt to verify each of the statements in the Article. *See* DSA 1102, 1134-36, 1189, 1352, 1357-59. And while the editors were aware that Ben-Menashe's credibility had its problems, they knew that he was consistently making the same accusations, and more, to other journalists and congressional investigators. DSA 1135, 1272-75, 1293-94.

The Esquire editors testified without contradiction that the following information — known to them prior to publication — stood out from the melange of material and gave Esquire the confidence to report Ben-Menashe's charges: (1) congressional investigators were taking Ben-Menashe seriously, (2) Ben-Menashe was one of the original sources for Iran-Contra, (3) former Attorney General Richardson relied on Ben-Menashe in the Inslaw case, and (4) Unger had failed to uncover any evidence disproving the reported allegations. DSA 1135-36, 1272-75, 1293-94.

### D. Petitioner's Misstatements of Fact

In seeking review, Petitioner not only ignores the indisputable evidence that there was no actual malice on the part of any respondent, but misstates critical facts. He claims, with-

out record citations, that the author and publisher “acknowledged” or “knew” that Ben-Menashe was, alternatively, an “untruthful informant,” a “known liar,” a “notorious liar,” or just a plain “liar.” See Petition at i, ii, 4, 10, 11, 12, 18, 19, 25, 27, 29. This is wrong, and is clearly an attempt to bootstrap this case into the realm of inapposite actual malice decisions such as *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) where there was hard evidence that journalists published allegations of a known liar or disregarded information directly refuting a source’s allegations.

Neither Unger nor Esquire ever “acknowledged” or “knew” that Ben-Menashe was a “liar,” nor did they uncover any evidence contradicting Ben-Menashe’s claims about McFarlane. On the contrary, the author stated unambiguously at his deposition that: “I never caught him [Ben-Menashe] in a lie and I tried. I tried to catch him in lies many, many times and I never did.” JA 226. As one of the magazine editors explained: “We wouldn’t have used him as a source unless we thought that he had some knowledgeability. . . . We also knew that he, Ari Ben-Menashe, was the source of the Iran-contra story, and certainly that had checked out, and also that Congress was investigating Ari Ben-Menashe’s charges and using him as a witness.” DSA 1134-35. *McFarlane*, 74 F.3d at 1304. And as then-Editor in Chief Terry McDonell added: “People with a great deal of intelligence resources were saying, he’s [Ben-Menashe’s] right or he is who he says he is.” DSA 1293.

Further, Petitioner’s contention that “Ben-Menashe’s believability depends upon the endorsement of Elliot Richardson” (Petition at 7) also misstates the facts. Ben-Menashe’s believability was supported by much more than just Richardson. As Unger knew, Oliver’s interviews with Ben-Menashe prompted a call for a formal congressional inquiry. JA 685-86. Sick told Unger that he believed Ben-Menashe to be knowledgeable, and Parry and Hersh had used or were using Ben-Menashe as a source on the October Surprise and other intelligence-related stories. JA 210, 695-96.

Other sources interviewed by Unger were consistent. Former Israeli Brigadier General Avraham Bar’Am, while first questioning Ben-Menashe’s bona fides, later conceded —

after a telephone call with Ben-Menashe — that Ben-Menashe was indeed knowledgeable. JA 496, 702. Richard Shears, a veteran journalist and correspondent for the *London Daily Mail* who was assisting Ben-Menashe with a book, told Unger: “Certainly on Ari’s credibility, you know, we have absolutely no doubt whatsoever. . . . [Ben-Menashe’s October Surprise scenario] is absolutely sensational and I have no doubt that it is true.”<sup>7</sup> Although some of Unger’s sources expressed surprise at the startling nature of the allegations about McFarlane, not one provided evidence to contradict Ben-Menashe’s allegations. JA 159-60, 213-15, 221-22, 250, 702-03. See D. Ct. Op. at 54a.

### REASONS FOR DENYING THE WRIT

**THE DECISION BELOW IS CONSISTENT WITH THREE DECADES OF PRECEDENT PROTECTING THE PUBLICATION OF STATEMENTS MADE WITHOUT ACTUAL MALICE IN A PUBLIC FIGURE LIBEL CASE.**

More than thirty years of Supreme Court and circuit court precedent have solidified the principle that a plaintiff must show actual malice by clear and convincing evidence at the summary judgment stage. Petitioner, cognizant that he has no evidence of actual malice sufficient to meet this standard, asks this Court to overrule *New York Times v. Sullivan* and its progeny. While this wistful request may be candid, the Court should decline Petitioner’s invitation to dislodge decades of American libel law.

7. See Exhibit 69 to Defendants’ Motion for Summary Judgment filed with the District Court at Document No. 2811-12.

### A. The Lower Court Properly Applied The Law Of Actual Malice In Affirming Summary Judgment.

By using rhetorical "shield" concepts which Petitioner claims were invented from whole cloth by the Court of Appeals, Petitioner attempts to accomplish by advocacy what he cannot do with hard evidence: namely, demonstrate clearly and convincingly that respondents published a false statement of fact with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or "entertained serious doubts as to the truth of [the] publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or acted with "purposeful avoidance of the truth." *Connaughton*, 491 U.S. at 692.

The Court of Appeals did not fashion any "special rules" (Petition at 29) in affirming summary judgment for respondents. Nor did its decision conflict with that of *any* other circuit. Rather, the Court of Appeals, and the District Court, took painstaking looks at the evidence presented by Petitioner and, drawing from leading Supreme Court and appellate court decisions, came to the unremarkable conclusion that Petitioner's evidence did not add up. Indeed, it is Petitioner's reliance on journalism criticism rather than evidence of a "high degree of awareness" of probable falsity that permeates his Petition. See *Garrison*, 379 U.S. at 74. But, of course, courts "do not sit 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.'" *Tavoulareas v. Piro*, 817 F.2d 762, 796 (D.C. Cir.) (en banc), cert. denied, 484 U.S. 870 (1987) (citation omitted).

While Esquire's journalism may be a target for criticism, so too are the subsequent efforts to assess whether an October Surprise occurred. Even the two-year, multi-million dollar congressional investigation which rejected the October Surprise theory (see *McFarlane*, 74 F.3d at 1298-99) was harshly

criticized in some circles as a whitewash.<sup>8</sup> In any event, the actual malice standard requires evidence, not criticism, to propel a public figure libel case past the summary judgment stage.<sup>9</sup> The only evidence in this case shows that Esquire never tried to conceal the issue of Ben-Menashe's credibility from its readers, and never had serious doubts about Ben-Menashe's statements.

### 1. Reliance On A Veteran Journalist And His Thorough Research Does Not Constitute Actual Malice.

The uncontradicted evidence indicates that the Esquire editors relied on Unger for the substantive research and accuracy of the Article. As Research Editor Mark Warren explained in his deposition, "Mr. Unger had done an extraordinarily extensive job of reporting the story," and therefore there was no reason for Esquire to independently

8. See, e.g., Robert Parry, *October Surprise X-Files*, The Consortium, Dec. 21, 1995 at 6, where the author, after an independent review of both classified and unclassified documents left behind by the House Task Force, concluded that "[t]he boxes of documents revealed that the task force used false alibis on [former CIA Director William] Casey's whereabouts for key October Surprise dates; withheld relevant documents and testimony that clashed with its conclusions; dismissed credible witnesses who supplied unwelcome support for the allegations; and accepted dubious — if not blatantly false — testimony from Republicans." "[T]he dismissive House task force report," writes Parry, "effectively buried the October Surprise story as an historical issue." *Id.* at 4.

Of course, the October Surprise Task Force's conclusion, even if credited today, is irrelevant to the actual malice determination in this case, for actual malice may be analyzed only as of the time of publication. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964).

9. The caliber of Petitioner's actual malice evidence is best illustrated by his suggestion that Esquire's publication of a "picture of a sexily dressed woman" — instead of using the space to include "less cleavage" and more words from an ambiguous quote from Elliot Richardson — constitutes clear and convincing evidence of actual malice. See Petition at 15 n.4. The "sexily dressed woman" was, in fact, a model in an advertisement for Piper-Heidsieck champagne that was published above the text of two pages of the Article. Petitioner's "cleavage" theory of actual malice is even more fanciful than other impermissible attempts to intrude on a publisher's editorial discretion. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

attempt to verify each of the statements in the Article. DSA 1352, 1357-58. Other editors echoed the same sentiment. DSA 1102, 1189, 1299, 1304. This type of reliance on the writer does not constitute actual malice. *McFarlane*, 74 F.3d at 1304-05. See *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1319 (7th Cir. 1988) ("for purposes of constitutional malice, [the magazine's] editors were under no obligation to check [the writer's] facts at all") (citation omitted).

Consistent with the widely-accepted practice in the magazine industry, Esquire editors did not review all of the materials that Unger gave him, but simply spotchecked portions of the Article. See DSA 1329, 1334, 1339, 1341, 1358, 1388, 1405. There was no evidence that any employee of Esquire was aware of any information contradicting Ben-Menashe's claims about McFarlane. On the contrary, Esquire knew that Ben-Menashe was making similar claims to congressional investigators and others.<sup>10</sup> Even assuming that proof of falsity exists somewhere in the documents that Unger provided, which it does not, there remains an absence of proof that any employee of Esquire was aware of the information or purposefully avoided it. See *Connaughton*, 491 U.S. at 665 (even "extreme departure" from accepted journalistic standards is not actual malice); *St. Amant*, 390 U.S. at 733 ("failure to investigate" is not actual malice).<sup>11</sup>

10. See, e.g., testimony of Literary Editor Will Blythe at DSA 1135 ("We also knew that . . . Congress was investigating Ari Ben-Menashe's charges and using him as a witness.").

11. See also *Harris v. Quadracci*, 48 F.3d 247, 253 (7th Cir. 1995); *Tavoulareas*, 817 F.2d at 797; *Washington Post Co. v. Keogh*, 365 F.2d 965, 972-73 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); *Saenz v. Playboy Enterprises, Inc.*, 653 F. Supp. 552, 572 (N.D. Ill. 1987), aff'd, 841 F.2d 1309 (7th Cir. 1988); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 821-22 (N.D. Cal. 1977).

The record also is barren of any evidence that Unger prepared the Article with a subjective awareness of probable falsity.<sup>12</sup> Petitioner nonetheless attacks the Court of Appeals' unwillingness to examine Unger's state of mind based on its ruling — consistent with other circuits — that Unger's conduct cannot be imputed to Esquire because (a) he was not an employee of the magazine, and (b) there was no evidence that Esquire supervised "the process by which Unger turned raw data into finished article (as distinct from control over his final product) . . . ." *McFarlane*, 74 F.3d at 1303. Petitioner overlooks the consensus among the circuits that evidence of an independent contractor's actual malice cannot be imputed to the publisher except under the doctrine of *respondeat superior*. See *id.* at 1302; *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1446 (8th Cir. 1989), cert. denied 493 U.S. 1036 (1990); *Hunt v. Liberty Lobby*, 720 F.2d 631, 648-49 (11th Cir. 1983).

12. The Court of Appeals seemed to suggest vaguely that there might be some evidence of actual malice as to Unger, though it did not explain this comment. See *McFarlane*, 74 F.3d at 1301 ("as we shall see"). Later in its decision, the Court characterized the telephone message Unger left with McFarlane's office in August 1991 as "apparent[ly] misleading" because his message did not include words such as "By the way, I plan to accuse you of being an Israeli spy." *Id.* at 1307. Yet the record does not support this criticism. Unger reasonably believed that, by asking to speak to McFarlane about "the allegations made about him in the Inslaw case," (JA 697) McFarlane would know what Unger meant, since McFarlane was already familiar with Ben-Menashe's Inslaw affidavit and its allegations that he had a "special relationship" with a leading Israeli intelligence figure and had improperly sold computer software to Israeli intelligence. JA 697-99, 921-22, 950-52, 958-61. Unger also explained that he did not leave a more precise message because he did not want to embarrass McFarlane by conveying detailed accusations to a telephone receptionist. JA 167-68, 187.

Of course, even if McFarlane had spoken to Unger and had denied the allegations, that still would not be enough to establish actual malice on the part of Unger or Esquire, for

the press need not accept "denials, however vehement; such denials, are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."

*Connaughton*, 491 U.S. at 691-92 n.37, quoting *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied, 434 U.S. 1002 (1977). See *McFarlane*, 74 F.3d at 1307-08.

Instead, he analogizes to the appellate decision in *Gertz*, but fails to recognize that the control over the editorial product exercised by the publisher in *Gertz* is not present here. See *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). In *Gertz*, the publisher "conceived of a story line," solicited a writer with a "known and unreasonable propensity to label persons or organizations as Communist," provided the author with background material, "added further defamatory material based on [the author's] 'facts,'" and otherwise exercised "significant control . . . over the content and focus of the article." *Gertz*, 680 F.2d at 539, 539 n.19. Here, by contrast, Unger approached *Esquire* with a story idea, proposed a change in focus of the article to *Esquire* editors, conducted his own three-month independent investigation into the facts, and wrote — with one exception — all of the sentences at issue in this case without any substantive change made by the editors. Given their faith in Unger's credentials and abilities, the *Esquire* editors felt no need to "re-report" the article, and did not do so. DSA 1102, 1134-36, 1189, 1352, 1357-59.

It would turn actual malice on its head to adopt a standard that would impose liability upon a publisher for refining an investigatory piece of journalism, absent clear and convincing proof that the publisher exercised direct control over the writing process or that the publisher itself unearthed flatly contradictory information, which did not occur here. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. Far from serious doubts, the record in this case shows that the editors had *no* doubts about publishing Unger's work given the depth of his research and reporting, their knowledge of his reputation, and their awareness of Ben-Menashe's statements to congressional investigators and others. See, e.g., DSA 1102, 1134-36, 1189, 1272-75, 1293-94, 1352, 1357-59.

## 2. Questions About A Source's Credibility Do Not Prove Actual Malice.

Petitioner's continuing attack on the *Esquire* editors' assessment of Ben-Menashe's credibility reveals a fundamental misunderstanding as to both the nature of news reporting and the basic premise of American libel law. Actual malice, of course, depends on the defendant's state of mind at the time of publication, or, in other words, after the reporting process has essentially been completed. See *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 512 (1984). Neither Unger nor *Esquire* ever tried to hide lingering questions about Ben-Menashe. *Esquire* informed the readers in no uncertain terms that Ben-Menashe had his detractors, quoting two journalists and a former CIA official who described Ben-Menashe as "a fake," "a liar," and a "nasty fuck." JA 289.

At the same time — relying on the statements of, among others, a former United States Attorney General (Richardson), a former National Security Council official (Sick), a former Chief Counsel of the House Foreign Affairs Committee (Oliver), a former Pulitzer Prize winner (Hersh), another respected journalist (Parry), and a former Israeli Brigadier General (Bar'Am) — *Esquire* pointed out that Ben-Menashe was "almost impossible to dismiss." JA 289, 692-705; DSA 1135-36, 1273-74. *Esquire*'s candid treatment of Ben-Menashe's credibility in the Article evinces the exercise of careful editorial judgment, not reckless disregard for the truth. *McFarlane*, 74 F.3d at 1304 ("[F]ull (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one."). See *Tavoulareas*, 817 F.2d at 788 n.35; *Edwards*, 556 F.2d at 120; *Secord v. Cockburn*, 747 F. Supp. 779, 793 (D.D.C. 1990) ("the mere fact that divided opinion exists among reporters as to the credibility of an individual does not reflect on the defendant's state of mind and actual malice").

Unable to refute the endorsements of numerous other sources, Petitioner focuses only on the purportedly "fabricated endorsement" by Richardson of Ben-Menashe's credibility. Petition at 7. In particular, Petitioner takes issue with the decision not to include the clause "Quite apart from what he

knows" among Richardson's quotations. Petition at 7-8. The editors, however, testified uniformly that the decision not to include that clause was driven by space considerations, coupled with their belief that deleting the clause would not materially change the meaning of the quotation, as the Court of Appeals so found. DSA 1136-37, 1214-16, 1281-82, 1398-99; see *McFarlane*, 74 F.3d at 1306-07. True to form, Petitioner's argument completely ignores the affidavit Richardson submitted to the District Court in this action, where Richardson said, "[t]he statements and quotations attributable to me [in the Article] accurately reflect statements I made to Mr. Unger, and accurately reflect my views of Mr. Ben-Menashe." JA 680-82. Richardson's affidavit goes beyond merely supporting a defense of truth (see *McFarlane*, 74 F.3d at 1306); it validates Esquire's editing of his comments about Ben-Menashe. See D. Ct. Op. at 57a. Contrary to Petitioner's claim that Esquire somehow altered the gist of Richardson's sentiments in its editing process, Richardson himself has recognized under oath that the Article accurately portrayed his view of Ben-Menashe as being "who he says he is." JA 680-82.<sup>13</sup>

Even if Petitioner could show some kind of careless editing mistake by Esquire, which he cannot, he still would fall far short of proving actual malice. Actual malice is not imprecise or inartful writing, or careless editing that results in an implication that the writer or editors did not perceive. *Newton v. National Broadcasting Co.*, 930 F.2d 662, 680-81, 685-86 (9th Cir. 1990), cert. denied, 502 U.S. 866 (1991); *Hutchinson v. Proxmire*, 431 F.

13. Equally unpersuasive is Petitioner's argument that Esquire "fabricated" the statement that McFarlane declined comment. Petition at 17. The uncontradicted testimony proves that the editors changed the sentence from "McFarlane . . . denied the charges" to "McFarlane . . . declined comment" in an effort to be more precise and to "more accurately reflect [McFarlane's] response . . . at that time." DSA 1128-30. As Articles Editor Hirshey explained:

All along [the Esquire editors] were holding space for comments from Mr. McFarlane and Mr. Brian, and at this stage we were near the end of the editing process and Mr. Unger reported that none of his phone calls or his letter had been answered. So . . . we changed the language . . .

DSA 1210-11. See *McFarlane*, 74 F.3d at 1307.

Supp. 1311, 1329 (W.D. Wis. 1977), aff'd, 579 F.2d 1027 (7th Cir. 1978), rev'd on other grounds, 443 U.S. 111 (1979). Nor is it reliance on a single source, or reliance on a biased source. *St. Amant*, 390 U.S. at 730, 733; *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 716 (4th Cir.), cert. denied, 501 U.S. 1212 (1991); *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491, 1498 (11th Cir. 1988); *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966). Actual malice is not taking an "adversarial stance" or "express[ing] a point of view." *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 601 (D.C. Cir. 1988), cert. denied, 489 U.S. 1010 (1989); *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 627 (2d Cir.), cert. denied, 488 U.S. 856 (1988); *Tavoulareas*, 817 F.2d at 795. All of these arguments were properly rejected by an appellate court that sifted through the voluminous record and dutifully applied precedent:

In sum, given Ben-Menashe's supposed role as a source in Iran-Contra, Unger's reputation with Esquire, and the inherent difficulties in verifying or refuting a claim that someone is the agent of a foreign power, the proofs do not add up to the possibility of a reasonable jury finding of clear and convincing evidence of reckless awareness of probable falsity, and in no way show an actual belief in falsity.

*McFarlane*, 74 F.3d at 1305.

## **B. The Lower Court Properly Held That Personal Jurisdiction Could Not Be Asserted Over The Author.**

In challenging the Court of Appeals' determination that the District Court could not assert personal jurisdiction over Unger, Petitioner asks the Court to overturn a decision by Congress to separate the distinct principles of "act" and "injury" in tort actions. But as Judge Bork noted in *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217 (D.C. Cir. 1986), D.C. Code § 13-423(a)(3) is a

"precise and intentionally restricted tort section," which "stops short of the outer limits of due process," and which confers jurisdiction only over a defendant who commits an act in the District which

causes an injury in the District, without regard to any other contacts.<sup>14</sup>

*Moncrief*, 807 F.2d at 221, quoting *Margoles v. Johns*, 483 F.2d 1212, 1219 (D.C. Cir. 1973) and *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1088 (S.D.N.Y. 1984). See *McFarlane*, 74 F.3d at 1300 (McFarlane's claim "would obliterate subsection (3)'s careful distinction between 'injury' and 'act'."). The statute at issue, which was chosen by Congress over two other proposals, is "one of 'moderate reach,' [that] reflected an intention to 'separate "act" from "injury," granting jurisdiction over non-residents who by their out-of-state acts or omissions cause tortious injury within the state only where additional minimum contacts with the state are also present.'" *Moncrief*, 807 F.2d at 219-20, quoting *Margoles*, 483 F.2d at 1216.

In creating the statute, Congress did not create "special procedural protections" just for libel suits. See Petition at 28. On the contrary, the statute applies to *all* tort actions:

[A]t minimum two actions are necessary for the tort of slander — one individual must act in speaking the words of defamation while another must act in hearing them to the injury of a third party. *This is no different from almost any tort, however, for more than one action is nearly always necessary to give rise to a cause of action.*

*Margoles*, 483 F.2d at 1217 (emphasis added).

Petitioner's argument boils down to a simplistic theory of jurisdiction by association, where any defendant would have to answer claims of libel anywhere the offending material is published by anyone. This Court has repeatedly disavowed similar theories of vicarious jurisdiction. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("Each defendant's con-

14. Petitioner has waived his claims that personal jurisdiction over Unger was proper pursuant to D.C. Code § 13-423(a)(1) and § 13-423(a)(4). See *McFarlane*, 74 F.3d at 1300-01; Petition at ii, 27-28. Accordingly, an inquiry into Unger's contacts with the District of Columbia is not before this Court. Of course, Unger was a freelance writer who did not publish or circulate the magazine.

tacts with the forum State must be assessed individually."); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Jurisdiction under D.C. Code § 13-423(a)(3) requires specific proof of a tortious act or omission in the District, as the District of Columbia courts have agreed. See *Moncrief*, 807 F.2d at 221; *Margoles*, 483 F.2d at 1218-19; *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980).<sup>15</sup>

Petitioner wrongly argues that this Court should overrule established caselaw because *Keeton* defines libel "generally" to occur "wherever the offending material is circulated." First, *Keeton* construed a New Hampshire statute with a different framework. *Moncrief*, 807 F.2d at 221 (statute applied if defendant "'commits a tort in whole or in part in New Hampshire'" (citation omitted). As Judge Bork noted in *Moncrief*, the New Hampshire statute in *Keeton* and the California statute in *Calder v. Jones* extend jurisdictional boundaries to the outer limits permitted by the Due Process Clause. The District of Columbia statute, of course, does not. Compare *Moncrief*, 807 F.2d at 221, 223 with *Calder v. Jones*, 465 U.S. 783, 786 n.5 (1984); *Keeton*, 465 U.S. at 774. Second, neither *Keeton* nor *Calder* involved the issue of jurisdiction over a freelance author. Indeed, *Keeton* considered only the jurisdictional reach over publishers, and strongly cautioned that the same analysis did not necessarily apply to other defendants. *Keeton*, 465 U.S. at 781 n.13.

Far from engaging in a "metaphysical parsing" (Petition at 28) of the District of Columbia statute, the Court of Appeals rightly avoided "delv[ing] into a magical mystery tour" (*Margoles*, 483 F.2d at 1218) of asserting jurisdiction in a manner prohibited by the plain language of the statute.

15. For a writer, the act of publication occurs where he or she writes, not where the writing ultimately alights. See, e.g., *Crane v. Carr*, 814 F.2d 758, 761 (D.C. Cir. 1987); *Moncrief*, 807 F.2d at 220-21; *Reuber v. United States*, 750 F.2d 1039, 1049-50 (D.C. Cir. 1984); *Tavoulareas v. Comnas*, 720 F.2d 192, 193-94 (D.C. Cir. 1983); (JA 1007-08).

### CONCLUSION

This case has run its course. Two courts have carefully examined the ample record — including transcripts of nearly a dozen depositions of Esquire personnel and thousands of pages of Unger's interview notes — and found insufficient evidence of actual malice. In so doing, the lower courts have repeatedly rejected Petitioner's mercurial blend of advocacy, invective and literary criticism, and ignored his plea to lower or remove the bar of actual malice to suit his case.

The bar was carefully calibrated at its current height more than thirty years ago to protect the freedom to speak about public affairs and public officials — the very speech Petitioner seeks to punish in this case. This Court should resist Petitioner's invitation to turn back the clock for his convenience to the days before *New York Times v. Sullivan*, when the publication of a controversial statement about a public official was an occupational hazard rather than a constitutionally-protected activity.

Respectfully submitted,

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